

2. Applicant's November 12 Response argues that Fig. 13 and its corresponding description do not constitute an admission of prior art, because the Applicant is unaware of the Fig. 13 subject matter available in a manner that would constitute prior art pursuant to 35 U.S.C. §102.

3. An affidavit by the inventor, stating that he is not aware of any instance of the art described in the application as "conventional" that qualifies as statutory prior art in the United States under 35 U.S.C. §102, was filed on January 15, 2004.

4. The February 11, 2004 Office Action rejected Applicant's arguments regarding the "AAPA," and cited a dictionary definition of "conventional" as "...lacking originality or individuality...ordinary, common place...a traditional design." Regarding the affidavit filed January 15, the Office Action simply stated that "the Examiner consulted a Special Project Examiner for further guidance. The Special Project Examiner indicated that the affidavit, on its own, would not be sufficient to overcome the prior art rejection... ." The Office Action gave no indication as to why the affidavit would not be sufficient to overcome the prior art rejection.

5. Applicant requested a reconsideration in a May 10, 2004 response, to which was attached a copy of the affidavit filed January 15.

6. On May 25, 2004, the Patent Office mailed an Advisory Action, which indicated that "Applicant's arguments of May 10, 2004 have not convinced the Examiner to remove any rejections, and Examiner directs the Applicant to the Examiner's response of February 11, 2004 for further clarification. Also, Applicant is directed toward MPEP 2129 regarding the admission of prior art."

Applicant respectfully submits that the Final Rejection and Advisory Action are improper for at least the following reasons.

1. Final Rejection and the Advisory Action violate the substantive and procedural due process which the Patent Office is required to accord Applicants via the Administrative Procedures Act by failing to respond to Applicant's arguments, presented in the Amendment filed May 10, 2004, on all issues raised in the previous Office Action and repeated in the Advisory Action. See in this regard, In re Zurko, 119 S.Ct. 1816, 50 USPQ2d 1930 (1999), and In re Gartside, 53 USPQ2d 1769 (Fed. Cir. 2000).

Specifically, in the Amendment filed on May 10, 2004, Applicant again presented the arguments initially presented in the Amendment filed November 12, 2003 in response to the Office Action mailed August 15, 2003. Those arguments supported the traversal of the objection to Fig. 13 and the rejections of the claims under 35 U.S.C. §102(a) and 103(a). Those arguments are found on pages 6-9 of the May 10, 2004 Amendment, and point out that the information described as being "conventional" on page 1 of the specification, has not been admitted as constituting prior art under any of the subsections of 35 U.S.C. §102. The Final Rejection did not respond to the arguments, other than to say (as discussed above), without explaining why, that the Special Projects Examiner indicated that the affidavit would not be sufficient to overcome the prior art rejection, and the Advisory Action simply states, without explanation, that the Examiner has not been convinced to remove any rejection. These "responses" are not substantive responses as required by the Administrative Procedures Act.

2. The Office Action directs Applicant's attention to MPEP 2129. It appears that the Patent Office intends to reply on the case cited therein, In re Nomiya 509 F.2d 566, 184, USPQ 607 (CCPA 1975). However, there are important distinctions between In re Nomiya and the present application. For example:

(a) In the application of Nomiya, the Applicants "repeatedly acknowledged that Figs. 1 and 2 illustrate the prior art." See 509 F.2d at 571, n. 6. In contrast, in this

application, Applicant is repeatedly asserting that the alleged AAPA does not constitute prior art, to his knowledge.

(b) In In re Nomiya, the "prior art" figures were labeled with the actual words "prior art," and described under the heading "description of the prior art." In contrast, Fig. 13 of this application is discussed as "conventional," not "prior art," and is discussed under the heading "Background of Art," not "Description of Prior Art."

In the "Response to Arguments" section of the Final Rejection, the dictionary definition of "conventional" is recited, as discussed above. However, even these definitions do not serve to equate the term "conventional" with the term "prior art," as the latter is used in patent law. As an example, an inventor may make an invention on a given day, and the next day the invention would no longer be "new" (one of the definitions of "original"). However, the inventor's, or any other person's, previous-day knowledge would certainly not preclude patentability in the United States under §102. Thus, the Office Action's attempts to equate "conventional" with "prior art" are improper.

(c) Applicant's November 12 response includes an additional argument regarding claim 1 on page 9, last paragraph. Specifically, Applicant argued that the Office Action improperly relied on a single element as anticipatory of two discrete claimed elements. The Patent Office has not responded to this argument.

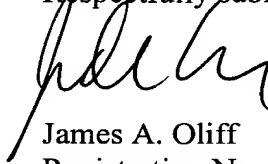
As discussed above, failure to respond to the arguments presented by the Applicant constitutes a denial of the procedural and substantive due process to which the Applicant is entitled under the Administrative Procedures Act.

For at least the foregoing reasons, it is respectfully submitted that the claims are distinguishable over the applied art. Accordingly, withdrawal of the rejections under 35 U.S.C. §§102 and 103 is respectfully requested. Alternatively, Applicant respectfully requests that the Patent Office mail a new Office Action addressing Applicant's arguments

presented in the May 10, 2004 Amendment. Thus, Applicant respectfully requests either favorable reconsideration and prompt allowance of the claims, or that the Patent Office mail a new Office Action addressing Applicant's arguments.

Should the Examiner believe that anything further would be desirable in order to place this application in even better condition for allowance, the Examiner is invited to contact the undersigned at the telephone number set forth below.

Respectfully submitted,



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